

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHERN ENVIRONMENTAL)
LAW CENTER,)
)
Plaintiff,)
)
v.)
)
FEDERAL AVIATION)
ADMINISTRATION,)
)
Defendant.)
)
)

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is a suit for declaratory and injunctive relief necessitated by Defendant Federal Aviation Administration’s (“FAA”) failure to respond to requests for the production of documents under the Freedom of Information Act (“FOIA”).

INTRODUCTION

1. In March 2018, Plaintiff Southern Environmental Law Center (“SELC”), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, requested information relating to FAA’s consideration of the environmental impacts and risks to human life of launching rockets over populated areas and critical natural resources from a proposed commercial spaceport on the Georgia coast.

2. FAA has failed to comply with statutory deadlines for the production of documents under FOIA. This delay is detrimental to SELC's participation in the ongoing environmental review of the project and the public's understanding of the project.

3. Despite attempts to contact FAA and resolve the matter without litigation, SELC has not received any substantive responses or requested records. SELC therefore seeks relief from this Court as provided under FOIA.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

5. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) because, upon information and belief, agency documents at issue are situated in this District. Venue is also proper under 28 U.S.C. § 1391 because a substantial part of the events and omissions which gave rise to this action occurred in this district.

THE PARTIES

6. Plaintiff SELC is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states. SELC's Georgia office is located at Ten 10th Street NW, Suite 1050, Atlanta, GA 30309. The FOIA requests at issue in this suit were initiated from that office.

7. SELC works collaboratively with more than 100 partner groups who depend on its legal expertise to complement and strengthen their efforts. SELC works with its partners and clients exclusively on a pro bono basis.

8. Among other areas, SELC works to promote sustainable development on the Georgia coast and to protect wetlands, waterways, and Georgia's barrier islands—including the Cumberland Island National Seashore and Wilderness Area. SELC analyzes policies and projects affecting the natural environment and public health, interacts with government officials to advance sustainable policies, and represents clients concerned with the above.

9. SELC communicates broadly with the public through a wide variety of media, including its website, its newsfeed, press releases, reports, interviews with the media, and presentations to other organizations and the general public. SELC has used many of these tools to communicate information and raise public awareness about the proposed spaceport.

10. SELC is a “person” within the meaning of FOIA.

11. Defendant FAA is a federal agency located within the United States Department of the Transportation (“DOT”). FAA is responsible for regulating the safe operations of the commercial space industry in the United States, including review and issuance of Launch Site Operator Licenses. In carrying out these

responsibilities, FAA must comply with federal environmental laws such as the National Environmental Policy Act of 1969 (“NEPA”).

12. Upon information and belief, agency records responsive to the FOIA requests at issue here are situated and maintained at FAA’s Southern Regional Office, located at 1701 Columbia Ave., College Park, GA, 30337.

13. FAA is an “agency” within the meaning of FOIA.

LEGAL BACKGROUND

14. “[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. . . . The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989) (internal citations and quotations omitted).

15. FOIA requires agencies of the federal government to promptly release non-exempt responsive records to the public upon request. 5 U.S.C. § 552(a)(3)(A).

16. Upon receipt of a FOIA request, an agency must respond with an initial determination on the request within 20 days (excepting Saturdays, Sundays, and legal public holidays). 5 U.S.C. § 552(a)(6)(A)(i). In “unusual circumstances”

an agency may extend the initial determination deadline by up to 10 working days. 5 U.S.C. § 552(a)(6)(B)(i). An agency must provide written notification of such an extension explaining the unusual circumstances and stating “the date on which a determination is expected to be dispatched.” Id.; accord 49 C.F.R. § 7.34 (DOT’s FOIA rules).

17. To make a “determination” under FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n, 711 F.3d 180, 186 (D.C. Cir. 2013).

18. While an agency may withhold documents according to exemptions specified under FOIA, such exemptions must be expressly invoked, and the agency bears the burden of establishing that withheld information is exempt from release. 5 U.S.C. § 552(a)(4)(B); Miscavige v. I.R.S., 2 F.3d 366, 367 (11th Cir. 1993).

19. If an agency denies, in whole or in part, a request for records under FOIA, the agency must provide any “reasonably segregable portion” of each record after deleting any portions that are exempt under the statute. 5 U.S.C. § 552(b).

FACTUAL BACKGROUND

Spaceport Camden

20. The Camden County Board of Commissioners is planning to operate a commercial spaceport (“Spaceport Camden”) on the south Georgia coast at a site bordered by the Satilla River, saltmarsh, and tidal creeks.

21. The proposed Spaceport Camden would launch orbital and sub-orbital rockets eastward over populated areas, including the Intracoastal Waterway, Little Cumberland Island, and Cumberland Island National Seashore.

22. Camden County is seeking a Launch Site Operator License from FAA. Such licenses require submittal of a risk analysis or “Hazard Analysis.” 14 C.F.R. §§ 420.23; 420.25; and 417.107.

23. Upon information and belief, FAA has in its possession a Hazard Analysis regarding proposed operations at Spaceport Camden.

24. Such analysis likely contains critical information currently unavailable to the public, including assumptions and conclusions about:

- a. Rocket launch failure rates;
- b. Anticipated areas where the rockets or debris would fall in the event of a failure or malfunction;
- c. Which areas, including residential areas on Little Cumberland and Cumberland Island, are at greater risk of harm;

d. Estimates of the scope of fire damage that would be inflicted upon coastal resources in the flight path, such as the densely vegetated Cumberland Island National Seashore and Wilderness Area;

e. Estimates of the scope of damage that would be inflicted upon nearby fisheries, saltmarshes, and waterways like the Satilla River and Intracoastal Waterway; and

f. Estimates of human fatalities in the surrounding areas from such catastrophic failures.

25. As part of the licensing process and as required by NEPA, FAA is preparing an Environmental Impact Statement to evaluate the potential impacts of Spaceport Camden. On March 16, 2018, FAA published a request for comments on its Draft Environmental Impact Statement (“DEIS”) for Spaceport Camden. 83 Fed. Reg. 11810. FAA extended the deadline for comments to June 14, 2018.

26. According to the DEIS, the probability of a launch failure at Spaceport Camden is between 2.5 to 6 percent. DEIS at 2-34.10. Launch failures typically occur: (1) at the launch pad soon after ignition, (2) after the rocket is in flight, or (3) during the return flight or at the landing site for first-stage landings. Id. at 2-34. Vehicle debris from explosions at the launch pad “would be expected to be confined to the launch site,” but debris from explosions during the other scenarios “would be expected to impact within the launch site boundary, or on land

or in water within the hazard area.” Id. at 2-34 to 2-35. The DEIS does not identify the geographic limits of this “hazard area.”

27. As a public interest nonprofit, SELC regularly reviews and submits public comments regarding NEPA documents. In order to more thoroughly evaluate these projects and participate in the NEPA process, SELC routinely requests agency documents regarding the project and draft NEPA documents.

Plaintiff’s FOIA Requests

I. The DEIS Request

28. On March 13, 2018, SELC submitted a FOIA request to FAA asking for the disclosure of “documents in the possession or control of the [FAA] that relate to the Draft Environmental Impact Statement for Spaceport Camden.” The request sought “all documents in the file, including drafts and emails ... [but excluding] any documents that are available on the FAA’s website for the Spaceport Camden EIS as of the date of this letter[.]” (“DEIS Request”). A fair and accurate copy of the DEIS Request is attached as Exhibit 1.

29. The DEIS Request was submitted in accordance with FAA’s published rules and procedures.

30. FAA acknowledged receipt of the DEIS Request on March 15, assigned it the FOIA tracking number 2018-005147, and “extend[ed] the response due date by a minimum of 10 working days because [FAA] need[ed] to search for

and collect records from field facilities.” A fair and accurate copy of FAA’s March 15, 2018 acknowledgement letter is attached as Exhibit 2. The acknowledgement letter indicates that the request was assigned to FAA’s Southern Regional Office.

31. There were no further communications from FAA until SELC inquired about the status of the DEIS Request in mid-May—more than thirty working days from the acknowledgement.

32. By letter dated May 23, FAA again “acknowledge[d] receipt” of the DEIS Request, and indicated that the request had “been [re]assigned for action” to FAA’s Washington, D.C. office. A fair and accurate copy of FAA’s May 23, 2018 DEIS Request acknowledgement letter is attached as Exhibit 3.

33. Almost three months passed without any further communication from FAA. In this time, the deadline for public comments on the DEIS passed and SELC submitted comments on the project without the benefit of the requested documents.

34. On September 17, and again on September 20, SELC left voicemail messages with the designated FAA point of contact (Susan McLean, Regional FOIA Management Specialist) seeking an update on the status of the DEIS Request. Both messages went unreturned.

35. As of the date of this filing, FAA has provided no information regarding the DEIS Request beyond the May 23, 2018 acknowledgement letter.

II. The Hazard Analysis Request

36. FAA treated SELC's second FOIA request similarly.

37. On March 19, 2018, SELC submitted another FOIA request to FAA seeking public disclosure of “the Hazard Analysis completed for Spaceport Camden[,] any drafts of the Hazard Analysis, and any documents discussing the Hazard Analysis” in FAA's possession or control. (“Hazard Analysis Request”). A fair and accurate copy of SELC's Hazard Analysis FOIA request is attached as Exhibit 4.

38. The Hazard Analysis Request was submitted in accordance with FAA published rules and procedures.

39. FAA acknowledged receipt of the Hazard Analysis Request on March 20, 2018, assigned it the FOIA tracking number 2018-005241, and “extend[ed] the response due date by a minimum of 10 working days because [FAA] need[ed] to search for and collect records from field facilities.” A fair and accurate copy of FAA's March 20, 2018 acknowledgement letter is attached as Exhibit 5. The acknowledgement noted that the request was assigned to FAA's Southern Regional Office.

40. There were no further communications from FAA until SELC inquired about the status of the Hazard Analysis Request in mid-May—more than thirty working days from the acknowledgement.

41. By letter dated May 23, FAA again “acknowledge[d] receipt” of the Hazard Analysis Request, and indicated that the request had “been [re]assigned for action” to FAA’s Washington, D.C. office. A fair and accurate copy of FAA’s May 23, 2018 Hazard Analysis Request acknowledgement letter is attached as Exhibit 6.

42. Almost three months passed without any further communication from FAA regarding the Hazard Analysis Request.

43. On September 17, and again on September 20, 2018, SELC left voicemail messages with the designated FAA point of contact (Susan McLean, Regional FOIA Management Specialist) seeking an update on the status of the Hazard Analysis Request. Both messages went unreturned.

44. As of the date of this filing, FAA has provided no information regarding the Hazard Analysis Request beyond the May 23, 2018 acknowledgement letter.

45. SELC and the broader public remain unable to review the assumptions and conclusions regarding the risks of rocket malfunctions and explosions at Spaceport Camden.

SELC’s Constructive Exhaustion of Administrative Remedies

46. SELC has constructively exhausted its administrative remedies because FAA has failed to respond to SELC’s FOIA requests by the statutory

deadline. 5 U.S.C. § 552(a)(6); Taylor v. Appleton, 30 F.3d 1365, 1368 (11th Cir. 1994).

47. FAA has not made an initial determination of whether documents responsive to SELC's FOIA requests exist.

48. FAA has not released any documents responsive to either of SELC's FOIA requests.

49. FAA has not provided a schedule of production for the responsive documents to either of SELC's FOIA requests.

50. FAA has not invoked a FOIA exemption for any of the responsive documents to either of SELC's FOIA requests.

51. FAA has not provided SELC any notice of its decisions or notice of a right to appeal within the agency.

CLAIMS FOR RELIEF

COUNT ONE: Improper Withholding of Records Responsive to the DEIS Request

52. Plaintiff SELC incorporates by reference paragraphs 1 through 51 of this Complaint as if fully stated herein.

53. Defendant FAA has violated FOIA by failing to provide SELC with all non-exempt, responsive records for the DEIS Request as provided by law under FOIA.

54. By failing to provide SELC with all non-exempt records responsive to its FOIA request, FAA has denied SELC's right to this information.

55. Unless enjoined by this Court, FAA will continue to violate SELC's legal right to access the records responsive to its FOIA request.

56. SELC is directly and adversely affected and aggrieved by FAA's failure to provide responsive records to its FOIA request as described above.

**COUNT TWO:
Improper Withholding of Records Responsive
to the Hazard Analysis Request**

57. Plaintiff SELC incorporates by reference paragraphs 1 through 51 of this Complaint as if fully stated herein.

58. Defendant FAA has violated FOIA by failing to provide SELC with all non-exempt, responsive records for the Hazard Analysis Request as provided by law under FOIA.

59. By failing to provide SELC with all non-exempt records responsive to its FOIA request, FAA has denied SELC's right to this information.

60. Unless enjoined by this Court, FAA will continue to violate SELC's legal right to access the records responsive to its FOIA request.

61. SELC is directly and adversely affected and aggrieved by FAA's failure to provide responsive records to its FOIA request as described above.

PRAYER FOR RELIEF

WHEREFORE, with respect to Counts One and Two, Plaintiff respectfully requests that this Court:

- (i) Declare that FAA has violated and is continuing to violate FOIA by failing to respond to SELC's FOIA requests;
- (ii) Declare that FAA has violated and is continuing to violate FOIA by improperly withholding documents that are responsive to SELC's requests;
- (iii) Establish a schedule for the production of all nonexempt, responsive documents to SELC without further delay;
- (iv) Order FAA to produce an index identifying any documents or parts thereof that it intends to withhold and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b);
- (v) Retain jurisdiction over this matter to rule on any assertions by FAA that responsive documents cannot be found or are exempt from disclosure;
- (vi) Award Plaintiff its reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
- (vii) Grant any other relief the Court deems just and proper.

Respectfully submitted,

/s/ Brian L. Gist

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